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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 765.

THE MANTLE LAMP COMPANY OF AMERICA, *Petitioner*,

v.

ALUMINUM PRODUCTS COMPANY, *Respondent*.

On Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

RESPONDENT'S REJOINDER TO PETITIONER'S REPLY BRIEF.

WM. NEVARRE CROMWELL,
Counsel for Respondent.

JAMES L. MCMANUS,
Of Counsel.

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The Court respectfully is asked to consider the following observations submitted by respondent because of certain statements by petitioner in its Reply Brief which find either no support in the Record or in the Blair patent in suit, or are at variance with the Record or the disclosure of the Blair patent. The comments herein made are not for the purpose of rearguing questions previously discussed. They

are directed to phases of petitioner's arguments raised in its Reply Brief and to which respondent had no opportunity to make answer in Respondent's Brief.

I.

The Alleged Simple Structure of the Blair Patent in Suit Has Been Made Complicated and Involved by Petitioner's Contentions.

Petitioner says (p. 1)* that the patent in suit discloses a very simple structure, is one that has gone into very general use, and that its mere simplicity should not be considered as an argument against invention when utility is considered. Such statement is without force when of the 48 pages of Petitioner's Brief it has been necessary for petitioner to utilize 44 pages to state the facts and argue the question of validity and supposed infringement, and to require 10 points with their subdivisions to set forth the issues and define petitioner's position herein.

Had petitioner confined itself to the plain and usual meaning of the language of the Blair patent, instead of distorting that language by strained and unusual interpretation thereof; by ascribing to the disclosure of the Blair patent structural features not found or shown therein and reading into the patent elements lacking in the disclosure of the patent, the structure shown in the Blair patent might have been found to be simple and the consideration of the issues of this case rendered less burdensome. The prior art, however, shows that what Blair did was old. It shows that he merely selected and did not invent. To avoid the effects of this petitioner used four experts—Davis (Rec. 29-46; 192-205), Johnson (Rec. 71-82; 209-214); Low (Rec. 173-180) and Whipple (Rec. 181-191). These efforts of petitioner have been directed to the bond, the testimony of Brainard and Terry, the decision of the Sixth Circuit Court of Ap-

*The paging herein designated refers to Petitioner's Reply Brief unless otherwise indicated.

peals and petitioner's misinterpretation of that decision, the invalidating effect of the prior art on the Blair patent, and the non-infringement of the Blair patent by respondent's structure.

Petitioner has beclouded instead of clarifying—it has complicated and not simplified.

Apparently, petitioner bases the statement that the Blair structure has gone into general use on the testimony of Johnson (Rec. 75) that they are used for every conceivable purpose for outside work. But the best Johnson could say as to such "every conceivable purpose" was the use in drilling rigs at oil wells and in the field by the farmer (Rec. 75)—not a very general use when the variety of fields in which the jugs might be employed is considered. Simplicity does not negative invention. This has no application in the case when petitioner has done nothing to establish simplicity in the Blair device or in the conduct of the proceedings in which the Blair patent has been involved. Petitioner's observations, therefore, are without merit.

II.

Petitioner's Admission that Blair Patent is Not Limited to a Particular Form of Bond Renders Any Kind of Bond Applicable to Blair Patent.

At page 2 petitioner says Blair patent is not limited to a particular form of bond and is broad enough to include any bond either mechanical or adherent. We have argued this question in respondent's main brief and shall not repeat. Suffice it to say that as Mr. Johnson testified that a bond is anything that ties two things together while the material that may be employed for the bond may be many different things (Rec. 80), the bonds and ties discussed by respondent in its main brief, whether of vacuum or non-vacuum receptacles, whether metal-to-metal, glass-to-metal, plaster of Paris or other forms and materials, defeat the claim of

invention made by Blair and petitioner, and clearly and definitely render claim 1 of the Blair patent invalid.

Petitioner (p. 2) also characterizes respondent's structure as an adherent and mechanical bond and likewise a water excluding seal. This is the first time that petitioner has so characterized that structure and implies that the Blair patent discloses a water excluding seal. There is no place in the Blair patent that describes a water excluding seal, express or implied, or gives foundation for the suggestion that Blair invented such or disclosed the same in the patent. The only point in the Blair specification where the word "seal" is found is line 114, page 2 (Rec. 344). There is not the remotest suggestion that this refers to "a water excluding seal" nor is any function ascribed to the same as there stated. The Blair patent, therefore, is lacking entirely in showing or affording any basis for asserting that the bond or tie 14 is "a water excluding seal."

The foregoing discussion answers petitioner's comments (pages 4-5) under Point III as to the decision of the Circuit Court of Appeals for the Sixth Circuit and its action in reading into claim 1 the alleged moisture excluding functions of the Blair bond. Petitioner here mentions claims 17 and 18 of the Blair patent as referring to the alleged moisture excluding features of the bond for showing properties other than adherency as claimed for the bond. We respectfully remind the Court that claims 17 and 18 are not here for review in view of the express limitation of the Circuit Court of Appeals for the Sixth Circuit to claim 1 and its finding as to that claim only. If there be any conflict of decision between the two Circuit Courts of Appeals it is only as to claim 1 of the Blair patent and to no other claims.

III.

Petitioner's Contentions that Art Relied on by Respondent is Too Old Emphasizes Value of this Art as Defeating Blair's Claim to Invention.

At first paragraph, page 6, petitioner argues that the art relied on by respondent is too old. Petitioner's position evidently is that it should be granted a patent for that which was discovered fifty years ago merely because it has popularized it through its advertising schemes. Having persuaded the Patent Office that Blair should have a patent for this old subject-matter, petitioner is doing its utmost to prevent others from using this old material.

This attitude of petitioner exemplifies and emphasizes the value of the old art accepted by the Seventh Circuit and the fact that the public, having attained the right to the use of this material, should not be deprived of that which petitioner is seeking to monopolize by an unwarranted interpretation and expansion of the Blair patent.

IV.

Respondent Never Has Taken the Position in Respect to Plaster of Paris that it is Porous and Not a Seal.

Respondent always has assumed the position, and adheres to the same, that plaster of Paris is a seal and will serve as an efficient bond. The statement to the contrary appearing at top of page 7 is wholly erroneous. The citation from the record is not correct as applicable to respondent.

V.

The Heat Insulating Efficiency of These Jugs is Relative.

Petitioner, at the top of page 9, makes the assertion that no heat-insulating device which depends upon a vacuum for insulation, anticipates a heat-insulating device of the non-vacuum type, and Blair, without employing a vacuum, pro-

duced a heat-insulated receptacle with a higher heat-insulating efficiency than any other device of the non-vacuum type.

The best efficiency which is claimed for petitioner's jug is eight hours.

Petitioner loses sight of the fact that Clisbee (Rec. 360) states that the liquid therein may retain its heat for twenty-four hours or more (Rec. 363, lines 9-13). There is nothing in the record to dispute successfully this statement of Clisbee. Petitioner's witness, Mr. Low, on cross-examination, stated that he had never tested the coffee can of the Clisbee patent. He did doubt the length of time that it would keep the coffee hot—he did doubt its efficiency; he thought the coffee would be warm at the end of this 24 hours but not hot. Having never tested the Clisbee can Mr. Low's testimony is neither conclusive or even persuasive. It is a guess pure and simple. As against the statement of the patentee Clisbee, Mr. Low's statement is of no impelling force.

In view of the foregoing, Blair did not make a new and patentable invention as asserted by petitioner at page 9.

VI.

Petitioner's Statement that Le Sieur (Rec. 402) Supports His Metal (Thermally Inefficient) Container Laterally and from the Bottom is Erroneous.

At page 9 petitioner makes a statement as to lateral and bottom support of Le Sieur's can. Le Sieur's statement (Rec. 403, lines 50.55) is that the means for supporting and bracing the bottom of the cans forms no part of his invention and the illustration is limited to the details of the necks and cover.

What bracing is used by Le Sieur is not disclosed. Most certainly, there is nothing on which petitioner can predicate any conclusion as to either lateral or bottom support.

VII

The Macomb and Monarch Records Before the Sixth Circuit and the Testimony of Respondent's Witnesses Amerine, Asbell and Wright.

The plain inference from page 11 is that the Sixth Circuit Court of Appeals, from its records in the Macomb and Monarch cases, had before it the testimony of the witnesses Amerine, Asbell and Wright. Wright testified in the Macomb case. Neither Amerine or Asbell testified therein, or in the Monarch case. The Sixth Circuit could not have had this evidence.

VIII.

Commercial Success of Petitioner's Jug Was Not Due to the Blair Invention.

Petitioner, at page 13, says that one saleman's sales the first two or three days with petitioner's structure in Boston alone amounted to close to $10,000. We have only the statement of Mr. Johnson, uncorroborated both by witness or records, as to this. Mr. Johnson is the president of petitioner. That was alleged to have occurred in 1920 (Rec. 75). That year petitioner spent $11,000 for advertising the jugs (Rec. 69).

At the bottom of page 13 petitioner also says that it is significant that the record discloses no sales of non-vacuum heat-insulated receptables that do not now employ the Blair structure. It is just as significant that the record does not show non-vacuum heat-insulated receptacles that do now employ the Blair structure.

IX.

Respondent's Designation of Mechanical Interlock for the Tie Between the Necks of its Container and Outer Jacket Correctly Describes that Tie.

At the bottom of page 14 petitioner criticizes respondent for applying the term "mechanical interlock" to its tie between the necks of the container and outer jacket of its jug. That is the only term which correctly describes the structure. Mr. Sessions, petitioner's expert, so defines the latter (Rec. 103).

CONCLUSION.

Respondent undoubtedly is entitled to the relief prayed.

Respectfully submitted,

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